

Glossary of Terms

Allotment - A tract of land that had been Tribal land and was allotted to an individual Indian. In addition, it may also be an area of public domain land, not in an Indian reservation, that was allotted under Federal law to an individual Indian.

Archaeological domains - Areas that include archaeological resources; term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, including, but not limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, etc. (or any portion or piece of any of the foregoing items). Nonfossilized and fossilized paleontological specimens are not considered archaeological resources, under the regulations of the Archaeological Resources Protection Act (ARPA), unless found in an archaeological context. ARPA also states that no item shall be treated as an archaeological resource unless it is at least 100 years of age.

The National Park Service regulations define "of archaeological interest" as meaning capable of providing scientific or humanistic understandings of past human behavior, cultural adaptations and related topics, through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation.

Ceded land or territory - Tribal land (or interests in Tribal land) acquired by the United States government that a Tribe either ceded, granted, relinquished, sold, or lost rights to under a treaty, other agreement or law of the United States. Some Tribes or their members retained rights to hunt, fish and/or gather other resources, even if the ceded lands are no longer within Indian Country.

Consultation - In terms of American Indians/Alaska Natives and the DoD, consultation can be defined as an effective, ongoing process that allows elected officials and other representatives of Tribes/Villages to provide meaningful and timely input into the development of DoD policies or practices that significantly or uniquely affect their communities.

Federally recognized Tribe - There are 558 Federally recognized Tribes in the United States, including 225 Alaskan village groups. Their status as "federally recognized" means they have a historical and ongoing political relationship with the Federal government. This unique **government-to-government relationship** is based on the definition of Tribes as sovereign nations; Indian Tribes are viewed as political entities, rather than ethnic groups. (A number of Indian Tribal Groups are not federally recognized, although some are State recognized; non-recognized groups do not have political relationship with the Federal government, and typically then cannot access Federal Indian programs.)

Indian Country - Usually defined based on the definition of that term in Title 18, USC, section 1151; includes (a) all land within the limits of any Indian reservation under the jurisdiction of the Federal government, (b) all dependent Indian communities within the borders of the United States, and (c) all Indian allotments, with intact Indian titles. The term is also used sometimes to include ceded land areas where Tribes or their members retained rights to hunt, fish or gather other resources.

Native American cultural items - The Native American Graves Protection and Repatriation Act states that cultural items include:

- Human remains;
- Associated funerary objects - objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum. Items made exclusively made for burial purposes or to contain human remains are also associated funerary objects;
- Unassociated funerary objects - objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and the remains are not in the possession or control of the Federal agency or museum. The objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains. Also includes objects that can be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual or individuals culturally affiliated with a particular American Indian Tribe;
- Sacred objects - specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents; and
- Cultural patrimony - an object having ongoing historical, traditional or cultural importance central to a Native American group or culture itself, rather than property owned by an individual Native American; object cannot be alienated, appropriated or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe (or Native Hawaiian organization). Object must have been considered inalienable by the Native American group at the time the object was separated from them.

Trust responsibility - A set of principles, legal concepts, laws, memoranda and executive orders that outline the responsibilities of the Federal government as trustee of Indian people and Indian-owned assets. Based on Federal Indian law, the government has certain obligations, including a fiduciary duty, to protect Indian property and lands, rights and resources.

Usual and accustomed - In terms of Indian Tribes, a place or practice that was/has been in normal and continuing use over a long period of time.

Appendix B: Definitions

Aboriginal Areas. This term is used today to describe the historic and prehistoric lands where a tribe(s) carried out food gathering or seasonal activities or traded with other Indian peoples. These areas may be extensive depending on the geographic terrain.

Aboriginal Rights. Aboriginal rights are based on aboriginal title, original title, or Indian title, which is the possessory right to occupy and use the area of land that Indians have traditionally used. Congress could extinguish such rights or title at will through treaty or otherwise. Individual aboriginal rights were based on continuous actual possession by occupancy, enclosure, or other actions establishing a right to the land to the exclusion of adverse claimants. For national forest managed lands such possession must have predated the establishment of the National Forest.

Aboriginal Title (original or Indian title). The limited possessory right to occupy and use the lands Indians traditionally used and governed before non-Indian settlement. Under the Fifth Amendment of the Constitution, these rights are extinguishable without compensation.

Allotted Lands—On Reservation. *The Dawes Act, or General Allotment Act, (1887)* provided for dividing reservations into separate parcels to encourage individual Indians in agricultural pursuits. Parcels were 160 acres for each family or 80 acres per single person. Any remaining acres over the population allocation were deemed "surplus" and opened up for settlement by non-Indians. Under the Act, Indian-held lands declined from 138 million acres in 1887 to 48 million acres in 1934. In 1934, the Dawes Act was superseded by the Indian Reorganization Act.

Allotted Lands—Off Reservation (public domain allotments). These public domain lands were set aside to fulfill a need to maintain recognition of a specific group of Indian people. These are sometimes called "Public Domain Allotments." Nearly all these acres are held in trust status by the Department of the Interior (DOI), and administered by the Bureau of Indian Affairs (BIA).

Ceded Lands. This term was first used in the *Treaty with the Wyandot, 1789*. Since that time, many treaties have referred to land cessions made by tribes to the United States. Most Federal agencies and Indian tribes prefer to use the term "ceded lands" when describing areas where a tribe did... "cede, relinquish, and convey to the U.S. all their right, title, and interest in the lands and country occupied by them"...at treaty signing or when reservations were established. Ceded land references are qualified by the legal definition of original tribal occupancy issued in 1978 by the U.S. Court of Claims. In effect: "only lands actually owned by a tribe can be ceded to the

U.S." This term is used interchangeably with "treaty boundary" described elsewhere in the definitions.

Confederated Tribe. A body of separate and different tribes who operate under one form of tribal government upon a reservation or Indian trust land.

Consumptive Water Uses/Rights. Ground or surface water which is diverted from its source and used for an activity and is not directly put back into the aquifer or stream; used without returning it to a stream or well.

Federal Recognition. Acknowledgment of an Indian tribe as a government entity that has a special relationship with the U.S. Government. This relationship recognizes that Indian tribes receive some benefits or reserve some rights not available to other citizens; for example, health and education benefits from the trust relationship or off-reservation hunting and fishing rights related to treaties with tribal governments.

The basic requirements for attaining Federal recognition include the following in the form of a petition to the Secretary of the Interior:

- A statement of facts regarding the continued identity of a group as "American Indian" or "Aboriginal" from historic times to the present
- Evidence that a group exists as a community separate from other populations
- Evidence it has maintained political influence over its members
- A governing document such as a constitution
- An enrollment list of all members
- Not be involved in pending legislation regarding their status, or terminated by former congressional action

Federally Recognized Indian Tribes. Federally Recognized Indian Tribes means an Indian group for which: (1) Congress or an executive order created a reservation for the group either by treaty (before 1871), statutorily expressed, agreement by executive order, or other valid administrative action; and (2) the United States has some continuing political relationship with the group, such as providing services through the BIA.

Federal Reserved Water Rights. Water is reserved by the United States as of the date when a Federal agency first established the purposes and intent for which an Indian reservation was created. The *Winters Doctrine* contains a description of the implied right to a water reserve on behalf of Federally Recognized Indian Tribes.

Fee Title (Fee Simple Title). Absolute ownership of a land area unencumbered by any other interest or estate.

Indian Country. Broadly speaking, Indian Country is all the land under supervision of the U.S. Government that has been set aside for the use of Indians. This would include Indian reservations as well as other areas under Federal jurisdiction and designated for Indian use. As a general rule,

state jurisdiction does not extend to Indian Country and, instead, tribal and Federal law governs. If someone says, "The crime took place in Indian Country," this implies that tribal or Federal law governs the crime, and the state has no jurisdiction (exception P.L. 280). Indian Country designation "is the benchmark for approaching the allocation of Federal, tribal, and state authority with respect to Indians and Indian lands."

The term "Indian Country" was first used by Congress in 1790 to describe the territory controlled by Indians. Today, a Federal statute concerning criminal jurisdiction provides the Federal Government's definition of this term. The law, Title 18, U.S. Code, section 1151 (18 U.S.C. 1151), states—

"Indian Country" means (a) all land within the limits of any Indian reservation under jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Proof that an area is Indian Country often involves complicated historical facts; such proof is an issue of law to be decided by a judge rather than a jury.

Section 1151 [above] identifies three areas as being "Indian Country:"

- First, Indian Country includes all lands within boundaries of an Indian reservation, regardless of ownership. Therefore, land located within a reservation but owned by a non-Indian is Indian Country. (There is an exception to this rule, discussed below.) Even rights-of-way through reservation lands, such as state or Federal highways, remain a part of Indian Country. When the Federal Government sets aside land under Federal supervision for Indians, the land becomes Indian Country. This is true even if there is no official proclamation that a reservation is being created, even if years go by before the tribe defends its property interests, and even if the land is not Federally owned trust land.
- Second, Indian Country includes "all dependent Indian communities" within the United States. A dependent Indian community is any area of land which has been set aside by the Federal Government for the use, occupancy or benefit of Indians, even if it is not part of a reservation. The Pueblos of New Mexico, whose lands are owned by the tribes themselves but under Federal supervision, are an excellent example. Other examples include tribal housing projects located on Federal land and Federal schools operated for Indian children on Federal land. However, predominant Indian use by itself will not create a dependent Indian community. There must also be some evidence of Federal or tribal control or supervision and an indication that the Federal Government intended to set the area apart primarily for Indian use.

- Finally, Section 1151 includes as Indian Country all "trust" and all "restricted" allotments of land, whether or not these allotments are inside an Indian reservation. (A trust allotment is Federal land which has been set aside for the exclusive use of an Indian, who is called the "allottee." A restricted allotment is land for which Federal approval must be obtained before it can be sold, leased, or mortgaged, whether the land is owned by the Federal Government or not. Even a "nontrust" allotment outside the reservation is considered Indian Country for as long as the allottee retains ownership. (A nontrust allotment is land the Federal Government has given to an Indian with full rights of ownership, as opposed to a trust allotment, ownership of which is retained by the United States). If the Federal Government has eliminated a tribe's reservation, but trust land still exists, either tribally or individually held, this trust land is Indian Country.

To summarize, all land within an Indian reservation, even land owned by non-Indians is Indian Country. In addition, trust and restricted Indian allotments outside a reservation are considered Indian Country, and so are dependent Indian communities.

There is, however, one exception to the rule that all land within a reservation is Indian Country. Privately owned land that can be classified as a "non-Indian community" is not Indian Country for purposes of Federal liquor laws. The state, rather than the tribe or the Federal Government, has jurisdiction to regulate the introduction of liquor in non-Indian communities, even though these communities are within the boundaries of an Indian reservation.

Indian Court. Any Indian tribal court or court of Indian offenses.

Indian Land. Any land in collective tribal holding or ownership for which the Secretary of the Interior has a continuing trust responsibility to manage for the benefit of the respective tribe. In the past, this term described certain parcels or areas where Indians lived and represented a smaller concept than Indian territory.

Indian Reservation. Usually created by treaty document or an executive order, this term refers to lands set aside for occupants' use, and benefit of American Indians and for other purposes. The primary intent of the United States at treaty negotiations was to make way for Euro-American settlement and maintain (or secure) peace between Indian peoples and European settlers. This land, described in metes and bounds, was put into a "trust" status with the U.S. agency (later Department of the Interior, Bureau of Indian Affairs) having the responsibility to administer reservation lands for the use and benefit of Indian people, consistent with the intent of the treaty. Some reservations were established after a peacekeeping treaty.

Indian Territory. These are unsurveyed lands that were recognized by the Federal Government to be occupied or used by Indians. Prior to the U.S. Constitution, lands occupied or used by American Indians were referred to as "Indian Territory." Historic documents dating back to the 16th century refer to these unsurveyed regions as a "territory."

Indian Tribe. Any American Indian or Alaska Native tribe, band, Nation, pueblo, community, rancheria, colony, or group subject to the jurisdiction of the United States, and recognized as possessing the powers of self-government and meeting the provisions in 25 CFR 83.7 or those recognized in statutes or treaties with the United States.

Minimum Instream Flows. Flows of water in a stream or river necessary to maintain a fish population. Quantities are usually measured in cubic feet per minute (CFM). This term is derived from Indian Water Rights litigation.

Nonconsumptive Water Uses/Rights. Water that is used within the stream, a body of water, that passes through a biological system or other use, is then returned to the original source at or near the original volume or quantity. The operation of a fish hatchery is a nonconsumptive use of water.

Nontrust Allotment. This is land the Federal Government deeded, in fee simple title, to an individual Indian whereon there is no trust obligation by the Secretary of the Interior (see trust allotments).

Open and Unclaimed or Unoccupied Lands. This term is also a trademark of the treaties negotiated in the 1850's. At the time of signing treaty documents, domestic use of horses and cattle was the main non-Indian lifestyle in the American West and had been for a full century. The term applied to public domain lands held by the United States that had not been fenced or claimed through a land settlement act. Today, "open and unclaimed lands" applies to lands remaining in the public domain (for the purposes of hunting, gathering foods, and grazing livestock or trapping). The courts have ruled that National Forest System lands reserved from the public domain are open, unclaimed, or unoccupied land, and as such the term applies to reserved treaty rights on National Forest System land.

Powers of Self-Government. Means and includes all governmental powers possessed by an Indian tribe: executive, legislative, and judicial; and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses.

Public Domain Land. This term describes any land ceded to the Federal Government from the colonial states, and land acquired by the Federal Government by purchase from or treaty with the Indians or foreign powers.

Recognized Title. Indian title that is authorized by treaty, statute, or executive order. Recognized title rights are protected under the Fifth Amendment to the Constitution; therefore, if extinguished, there is a right to compensation.

Restricted Allotment. Land that must receive Federal approval before it can be sold, leased, or mortgaged, whether the land is owned by the Federal Government or not.

Sacred Site. Means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian or Alaska Native tribe, or Indian or Alaska Native individual determined to be an appropriately authoritative

representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the Federal agency of the existence of such a site.

Sovereignty. First addressed in the U.S. Constitution, (Article I, Section 8 and Article VI). For Indian tribes that have Federal recognition, this is the *inherent governmental power from which all specific political powers are derived. Indian governmental powers, with some exceptions, are not powers granted by Congress, but are inherent powers of a limited sovereignty that have never been extinguished. Congress has the authority to limit or abolish tribal powers. However, without congressional action, a tribe retains the inherent right to self-government and no state may impose its laws on a reservation* (See also Tribal Self-Governance).

The Supreme Court first recognized the inherent right of tribal sovereignty in an 1832 case, *Worcester v. Georgia*. Worcester decided the question of whether the State of Georgia could impose its laws on the Cherokee Indian Reservation, a reservation located within the state's borders. In holding that Georgia could not extend its laws within the reservation, the Court stated:

Indian Nations (are) distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States...Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil from time immemorial...The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and the citizens of Georgia, have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the Acts of Congress.

The Worcester Doctrine of inherent *tribal* sovereignty has undergone some changes over the years, but its basic premise remains the same. An Indian tribe is a distinct political government. Congress has the authority to limit or even abolish tribal powers. Absent congressional action, a tribe retains its inherent right to self-government, and no state may impose its laws on the reservation. The Court reaffirmed this principle in 1991: "Indian tribes are "domestic dependent nations," which exercise inherent sovereign authority over their members and territories. Moreover, in recent years Congress has made a determined effort to strengthen tribal self-government. As the Supreme Court remarked in 1983, Congress appears "firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous Federal statutes."

Traditional. The beliefs, acts, practices, objects or sites for the perpetuation of an Indian culture originating from or historically located at a specific

area. This may include cultural practices that are so interrelated with spiritual activities that they cannot be separated from the land location.

Treaty. A legally binding agreement between two or more sovereign governments. With respect to American Indian tribes, a treaty is a document negotiated and concluded by a representative of the President of the United States and ratified by two-thirds majority vote of the U.S. Senate.

Treaty Boundaries. A modern term that applies to lands described within the treaty document, usually outlining an area of land that was ceded to the United States.

Treaty Rights. Tribal rights or interests, reserved in treaties, by Indian tribes for the use and benefit of their members. Such uses are described in the respective treaty document. Only Congress may abolish or modify treaties or treaty rights.

Tribal Government. A written system of rules or a constitution adopted by a tribal governing body that governs the actions and conduct of the general membership of the tribe(s). It may include such activities as law and order ordinances, tribal membership criteria, or regulations to govern the use of Indian-owned natural resources in Indian Country; usually within the bounds of an Indian reservation.

Tribal Self-Governance. First stated in modern terms by former President Nixon in 1970 as "Self Determination," this refers to the ability of Indian tribal governments to make decisions that affect either the general tribal population or tribal assets—a modern U.S. Indian policy that reinstates the independent decisionmaking process of Indian tribal entities that had existed before European contact. In 1982, Congress passed new authorities whereby Indian tribes could sign a compact directly with the Secretary of the Interior without involving the Bureau of Indian Affairs in the delivery of Federal services. Using appropriations formerly sent through the Bureau of Indian Affairs, Indian tribes can now prioritize their own expenditures of Federal funds.

Trust Allotment. Federal land set aside for the exclusive use of an Indian, who is the allottee. The Federal Government retains land ownership. Many allotments are outside the bounds of Indian reservations and are called public domain allotments.

Trust Land. Any land in collective tribal holding or individual ownership for which the Secretary of the Interior has a continuing trust responsibility to manage in a manner to benefit the respective tribe or individual. The most common example is forested acres on a reservation. Some trust lands were set aside as compensation for claims made against the Government, most of which are off-reservation.

Trust Responsibility. This term has never been defined by the U.S. Congress, any President, or any Cabinet official. Generally, it is a set of principles and concepts outlining the responsibilities of the U.S. Government to act as the trustee of Indian people and Indian-owned assets. The U.S. Government, through the President, has certain responsibilities to protect

Indian property and rights, Indian lands, and resources. The trust responsibility may involve a fiduciary obligation in which the President, through the Secretary of the Interior, acts as the trustee of Indian assets. Fulfilling or redeeming a trust responsibility, can best be reflected or demonstrated as a matter of action; a stream that was protected, a site that was maintained intact, a property right that has been left unaffected by a Federal action. The writing of an environmental document is not an example of fulfillment of a trust duty.

Usual and Accustomed Grounds and Stations (or Areas). This treaty term was used by L.I. Stevens in 12 treaties in the Northwestern United States. It describes lands adjacent to streams, rivers, or shorelines to which a tribe(s) usually traveled or was accustomed to travel for the purpose of taking fish. As this term applies to National Forest Systems lands, these areas are outside reservation boundaries. Western Federal courts have either referred to or defined the term when deciding lawsuits about the extent of a tribe's off-reservation treaty right to take fish. It has not been found by the courts to include hunting, gathering, grazing, or trapping. It is possible for "usual and accustomed areas" to extend beyond treaty area boundaries and to overlap large areas of a neighboring tribe, based on the specific treaty language. *This designation has been found by the court to create a property interest in the land, an encumbrance on the site that remains regardless of land ownership.*

Usufructuary. Having the legal right of using and enjoying the fruits or profits of something belonging to another. A land-use right where title to the land belongs to another person. A hunting right on National Forest System lands is an example of a usufructuary right.

Vested Right. Rights so completely settled they are not subject to be defeated or canceled by others. They cannot be interfered with by retrospective laws nor deprived of arbitrarily without injustice. An immediate or fixed right to present or future enjoyment which does not depend on an event that is uncertain. It is complete and consummated, and cannot be divested without the consent of the owner. Fixed, established, and no longer open to controversy.